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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 952

GREAT LAKES COCA-COLA BOTTLING COMPANY,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.**

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SUBJECT INDEX

To Petition for Writ of Certiorari

	PAGE
A STATEMENT OF THE MATTER INVOLVED	1-6
JURISDICTION OF THIS COURT TO REVIEW	6-7
QUESTION PRESENTED	7-8
REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT	8-12

SUBJECT INDEX

To Brief

THE OPINIONS OF THE COURTS BELOW	13-14
ASSIGNMENTS OF ERROR	14-16
ARGUMENT	16-23

INDEX OF CASES

Centennial Oil Co. vs. Thomas, 109 Fed. (2d) 359	17
Commissioner vs. Credit Alliance Co., 316 U. S. 107	8, 9, 12, 15, 18, 20, 21, 22, 23
Commissioner vs. Kay Mfg. Co., 122 Fed. (2d) 443	8, 10, 12, 17, 20, 21, 22, 23
Commissioner vs. Winchester Repeating Arms Co., decided Mar. 8, 1943 (not yet officially re- ported), found in C. C. H. Federal Tax Service for 1943, Vol. 4, p. 9486	8, 9, 10, 12, 15, 18
Crane-Johnson Co. vs. Helvering, 311 U. S. 54	6
Hassett vs. Welsh, et al., 303 U. S. 303	8, 10
Helvering vs. Credit Alliance Corp., 122 Fed. (2d) 361	8, 10, 17
Helvering vs. Northwest Steel Rolling Mills, Inc., 311 U. S. 46	6
Reed Drug Co. vs. Commissioner, 130 Fed. (2d) 288	11

II

AUTHORITIES CITED

PAGE

Statutes:

Revenue Act of 1936, 49 Stat., 1648, 26 U. S. C. A.	
1940 ed.	2
Sec. 14	2, 3, 6
Sec. 26	3, 6
Sec. 27	3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23
Sec. 112	2, 9, 10, 11, 14, 19, 20, 22
Sec. 115	3, 9, 11, 12, 14, 15, 18
Act of 1942, Sec. 501, Title 5	6

Miscellaneous:

Treasury Regulations 94, Art. 27(f)	4, 17
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GREAT LAKES COCA-COLA BOTTLING COMPANY,
Petitioner,
versus
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

A STATEMENT OF THE MATTER INVOLVED.

To the Honorable, the Supreme Court of the United States:

(The opinion of the Circuit Court of Appeals for the Seventh Circuit, of March 6, 1943, is not yet officially reported, but is found in R, pp. 39-43.)

This controversy involves the proper determination of whether or not petitioner is liable for a Federal Undis-

tributed Profits Surtax for the year 1937 in the sum of \$33,303.00 and interest.

The uncontroverted facts as found by the United States Board of Tax Appeals, (now the Tax Court) and by the United States Circuit Court of Appeals for the Seventh Circuit, are as follows:

On November 30, 1937, petitioner, a Delaware Corporation, with principal offices in Chicago, Illinois, in pursuance of a plan of reorganization, transferred all of its assets, including its earnings for the period January 1, 1937, to November 30, 1937, to a number of newly incorporated companies, organized in Michigan, Ohio, and Nevada, hereinafter referred to as the new corporations, in exchange for the new corporations' stock.

Petitioner then distributed this stock, in complete liquidation, to its stockholders, in exchange for their stock in petitioner, and was dissolved in December, 1937.

Under the provisions of Sec. 112 (b), (4), (3), of the 1936 Revenue Act, 49 Stat., 1648; 26 U. S. C. A., Int. Rev. Acts, 1940 ed., p. 855, these transactions constituted non-taxable reorganizations, and no gain or loss was recognized thereon.

As of January 1, 1937, petitioner had a deficit of \$36,988.00, and petitioner's adjusted net income, as defined by Sec. 14 of the 1936 Act, for the taxable year 1937, was \$195,262.00. (R, 17, 18, 39, 40.)

The pertinent provisions of the Federal Statutes and Treasury Regulations in 1936 were as follows:

Sec. 14 of the Revenue Act of 1936, 49 Stat., 1648; 26 U. S. C. A., 1940 ed., p. 283, imposed a tax upon undistributed net income, defining "Undistributed net income" as "Adjusted net income", minus the sum of the dividends paid credit, provided in Sec. 27, and the credit provided in Sec. 26 (c), relating to contracts restricting dividends.

Sec. 27 (a) provided that:

"For the purpose of this Title, the dividends paid credit, shall be the amount of dividends paid during the taxable year."

Sec. 27 (f) provided that:

"In the case of amounts distributed in liquidation, the part of such distribution, which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall for the purpose of computing the dividends paid credit, under this Section, be treated, as a taxable dividend paid."

Section 27 (h) provided that:

"If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the stockholders, as are subject to taxation under this Title, for the period, in which the distribution is made, no dividends paid credit shall be allowed with respect to such part."

Section 115 (h) provided that:

"The distribution (whether before January 1, 1936, or on or after said date) to a distributee by or on be-

half of a corporation, of its stock or securities, or stock or securities of another corporation, shall not be considered a distribution of earnings or profits of any corporation:

- (1) If no gain to such distributee from the receipt of such stock or securities was recognized by law
* * *."

Treasury Regulations, 94, Art. 27 (f), declared that a corporation making a liquidating distribution of earnings accumulated since February 28, 1913, must be denied the dividends credit, in respect of such distribution, unless the amount distributed, be taxable in the same year, to the distributee; and further provided that if the distributee in that year makes a distribution which entitles it to a dividends paid credit, it may allocate a proper proportion thereof, to the distributor of the liquidating dividend.

Now,—the sole issue before you is whether petitioner is, under the provisions of 27 (f) entitled to a dividends paid credit, in the full amount of its 1937 adjusted net income, distributed to its stockholders, at the time of its complete liquidation on November 30, 1937, such distribution having been made to petitioner's stockholders, in the stock of the new corporations, and in exchange for their stock in petitioner's corporation.

Other issues originally involved in the petition to the Board of Tax Appeals were: (a) petitioner's right to a dividends paid credit carry over of \$136,262.38 under the provisions of subsection (b) of Section 27 of the 1936 Act, which subsection allows in the computation of dividends paid credits, for the taxable year, a carry over of the divi-

dends paid in the preceding taxable year, in excess of adjusted net income for such year. This issue arose because of the fact that in 1936 petitioner had increased its capital surplus through the sale of additional common stock, at a premium, and from the proceeds of such sale petitioner retired its preferred stock issues and paid the accumulated dividends thereon, in a sum largely in excess of its 1936 adjusted net income, and while such excess was paid from subscribed capital surplus, petitioner believed it was at least equitably entitled to a carry over of such excess and a credit thereof against its 1937 adjusted net income, and in making its 1937 return petitioner took such credit, with the result that it paid an undistributed profits tax of \$6,923.40.

At that time petitioner did not realize, as it now contends, that it was, by virtue of its distribution in 1937 of all of its assets in liquidation, entitled to a dividends paid credit in the sum of its entire earnings or profits of that year, and therefore owed no undistributed profits tax whatever.

However, in presenting its case to the Board of Tax Appeals, petitioner abandoned all claim to such dividends paid credit carry over, but should this Court find that petitioner owes no 1937 undistributed profits tax, because of the provisions of Sec. 27 (f), then petitioner will be of course entitled to a refund of \$6,923.40, paid by it in error at the time of making its 1937 return.

(b) Furthermore, in its proceedings before the Board of Tax Appeals, petitioner also claimed in the alternative

a credit in the sum of its 1937 deficit, under the provisions of Sec. 26 (c) (1), 49 Stat., 1648; U. S. C. A., Int. Rev. Acts, 1940 ed., p. 836, because under the laws of Delaware (the State of petitioner's incorporation), petitioner was prohibited from distributing dividends in the face of such deficit. This claim was likewise abandoned by petitioner, upon the rendition of the decisions of this Court in *Helvering vs. Northwest Steel Rolling Mills, Inc.*, 311 U. S. 46, and *Crane-Johnson Co. vs. Helvering*, 311 U. S. 54.

This question is, however, again an issue, because of the amendment of Sections 14 and 26 of the 1936 Act by Title 5, Section 501, of the 1942 Act, relieving those companies which have been denied the credit allowed by Section 26 (c) of the 1936 Act, where they had been prohibited by law or by order of a public regulatory body, from paying dividends, during the existence of a deficit.

The Court below in the instant case, in affirming the decision of the Board of Tax Appeals, holding petitioner not entitled to a dividends paid credit under Section 27 (f), remanded this case to the Tax Court for the proper determination of whether petitioner is entitled to any relief under the Act of 1936 as so amended.

On motion of petitioner the Court below has stayed its mandate for thirty days, or until such time as this Court acts upon this application for a writ.

JURISDICTION OF THIS COURT TO REVIEW.

A review of the Judgment of the Circuit Court of Appeals is sought by this petitioner for Certiorari under sub-

section (a) of Sec. 347, Title 28, U. S. C. A., which provides that:

"In any case, civil or criminal, in a Circuit Court of Appeals, * * *,—it shall be competent for the Supreme Court of the United States upon petition of any party thereto, * * *, to require by certiorari, either before or after a judgment or decree, by such lower Court, that the case be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The judgment of the Circuit Court was entered March 6, 1943, (R, 39) and the three months' period provided for in Sec. 350, Title 28, U. S. C. A., for the filing of this petition for certiorari will not expire until June 6, 1943, prior to which date this petition will be filed with the Clerk of this Court.

QUESTIONS PRESENTED.

The questions presented in this petition for certiorari are whether the United States Circuit Court of Appeals for the Seventh Circuit, in its opinion in this case, (R, 39-43) has correctly interpreted or construed and applied Paragraphs 27 (f), and 27 (h), of the 1936 Revenue Act, 49 Stat., 1648; 26 U. S. C. A., Int. Rev. Acts, 1940 ed., p. 838, and whether such interpretation or construction and application are not in conflict with the decisions of the United States Circuit Court of Appeals for the Second

Circuit, in *Commissioner vs. Kay Mfg. Co.*, 122 Fed., (2d), 443; and with the decision of the Fourth Circuit in *Helvering vs. Credit Alliance Corp.*, 122 Fed. (2d), 361; and with the decision of this Court affirming the *Credit Alliance Corporation Decision*, 316 U. S. 107; and with the decision of the Seventh Circuit itself in *Commissioner vs. Winchester Repeating Arms Co.*, decided March 8, 1943, and not yet officially reported, but found in C. C. H. Federal Tax Service for 1943, Volume 4, page 9486; and lastly if the decision of the Court below is not directly violative of the rule enunciated by you in *Hassett vs. Welsh, et al*, 303 U. S. 303, at pages 303 and 314, and kindred decisions, that if a statute is free from doubt, the Court is without right to consider the purpose of Congress, and that if doubt exists as to the construction of a tax statute, the doubt should be resolved in favor of the taxpayer.

It is petitioner's contention that the decision of the Court below in the instant case is in direct conflict with the above referred to decisions of the Second, Fourth, and Seventh Circuits, and with the decision of this Court.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The sum and substance of the opinion of the Court below is simply that the distribution in liquidation made by petitioner to its stockholders of everything that it owned at the time; i. e., the stock of the new corporations, was not the distribution in liquidation contemplated by Sec. 27 (f) of the 1936 Act; that such stock so distributed could

not be broken down, in the recipients' hands, to show what part represented capital and what part was properly chargeable to the earnings or profit accumulated after February 28, 1913; and that while it is true that a corporation liquidating as did petitioner, distributes the only property it owns at that stage of the proceedings; namely, the stock of the successor corporations, the business enterprise continues pursuant to the plan, and the stockholder continues to be a stockholder, merely exchanging his stock in one corporation for that of another, and, says the Court, as it is the Court's opinion that petitioner is not within the purview of Sec. 27 (f), it deems it unnecessary to consider whether Sec. 115 (h) limits the effect of Sec. 27 (f), as the Commissioner contends.

However, in its decision in the *Winchester Repeating Arms Co.*, cases, *supra*, rendered March 8, 1943, this same Court below gives very careful consideration to such question and to the inference drawn by the Commissioner that had the *Credit Alliance* case involved the application of Section 115 (h), as amended by the 1938 Act, your decision in that case would have been otherwise, and that you would have held Section 115 (h) relevant, and that you "Would have been convinced that Section 27 (f) did not warrant the credit."

And, says the Seventh Circuit,—“We find no basis in the opinion of the Court for this assumption. As pointed out there we are not at liberty to disregard the direct and unambiguous language of subsection (f).”

Now,—while petitioner was liquidated and reorganized under the provisions of Section 112 (b), (4) and (3), of

the 1936 Revenue Act; while in *Commissioner vs. Kay Mfg. Corp.*, 122 Fed. (2d), 443; *Helvering vs. Credit Alliance Corporation*, 123 Fed. (2d), 361, 316 U. S. 107; and *Commissioner vs. Winchester Repeating Arms Co.*, C. C. H. Tax Service for 1943, Vol. 4, p. 9486, the liquidations were under the provisions of Section 112, (b) (6), of the 1936 Revenue Law, we submit that the decision of the Court below in the instant case is in direct conflict with the decisions in each of the above recited cases, in that in all of them the Court stresses the fact that the language of Section 27 (f) of the Act is direct and unambiguous, while the Court below in concluding that the distribution in liquidation made by petitioner was not the distribution in liquidation contemplated by Section 27 (f), and in resting its opinion and judgment on such construction, has undertaken to construe and interpret a provision of the law which under such decisions of the Second and Fourth Circuits, and of this Court is so clear and unambiguous as to preclude any interpretation other than the obvious meaning of the simple and unambiguous language used.

We further submit that the decision below is in direct conflict with the ruling declared by you in *Hassett vs. Welsh et al*, and kindred cases, (303 U. S. 303, at pages 303 and 314) that if a statute is free from doubt, the Court is without right to consider the purpose of Congress, and if doubt exists as to the construction of a taxing statute, that doubt should be resolved in favor of the taxpayer.

Petitioner says further that the decision of the Court below presents an important question of Federal Law, and even if such decision were not in express conflict with

the Second and Fourth Circuits, and with the Seventh Circuit itself, and with this Court, such question should be settled by this Court in any event because of its importance, not simply to petitioner, but to probably many other taxpayers, the number of which is necessarily unknown to your petitioner.

Petitioner further shows that insofar as known to petitioner, the only case other than the instant case involving Section 27 (f), and a liquidation and reorganization under Section 112 (b), (4) and (3), to be decided by a Federal Court of Appeals, is *Reed Drug Company vs. Commissioner*, a decision of the Sixth Circuit, reported in 130 Fed. (2d) 288. The decision in that case seems to rest, in part, upon the Court's belief that Section 27 (h) completely denies the benefit of Section 27 (f) to the taxpayer, if the money or property or securities is not taxable to the distributee, for, says the Court at page 289 of the decision, "It is clear that the Congress intended that Section 27 (h) should take away the credit given under Section 27 (f) in the case of a non-taxable corporate reorganization."

The Sixth Circuit Court further points to Section 115 (h) with the intimation that such subsection likewise modifies or controls Section 27 (f), and then the Court says that, "In construing tax statutes, we must remember that each act carries its own definitions and that the intent of the Congress is the controlling factor. This intent is to be ascertained by considering the entire context of the act, its general purpose, the circumstances surrounding its enactment, and other appropriate tests for ascertaining the will of the Legislators."

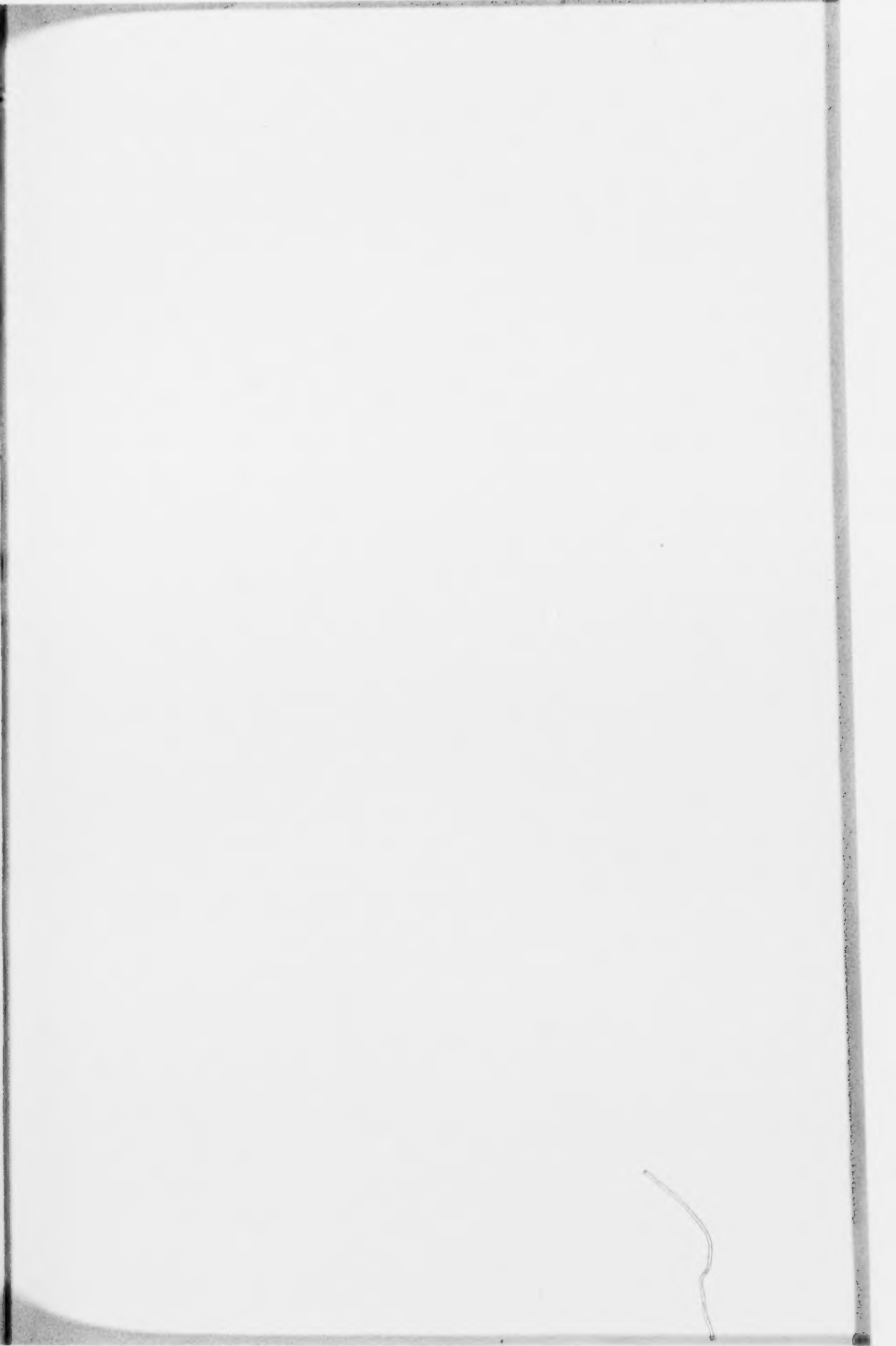
That Section 27 (h) controls Section 27 (f) is of course in direct conflict with both the Second and Fourth Circuits in the *Kay Mfg. Co.*, and *Credit Alliance* cases, *supra*, and with your decision in the latter, and too, the Sixth Circuit's finding that Section 115 (h) modifies and controls Section 27 (f) is in flat conflict with the decision of the Seventh Circuit in the *Winchester Repeating Arms* case, *supra*.

Therefore the issue in the instant case would seem to be definitely one for the final determination of this Court.

Wherefore, for the reasons herein shown, and as amplified in the annexed brief, petitioner prays that in the exercise of its discretion, this Court may issue its Writ of Certiorari, to review the decision herein of the Circuit Court of Appeals, and for such other orders as may be appropriate.

Respectfully submitted,

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942.**

No.

GREAT LAKES COCA-COLA BOTTLING COMPANY,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Board of Tax Appeals denying to petitioner the right to a dividends paid credit under Section 27 (f) of the 1936 Revenue Law, in the sum of petitioner's adjusted net income for 1937, distributed by petitioner to its stockholders at the time of its complete liquidation in November, 1937, such distribution having been made to petitioner's stockholders in the stock of certain new corporations, (parties to a reorganization), in exchange for the stock in petitioner corporation, is found in (R, 17-20), and reported in B. T. A. Reports, p. 1348.

The opinion of the Circuit Court of Appeals of the Seventh Circuit, affirming the decision of the Board of Tax Appeals upon the question herein presented, but for a different reason, is not yet reported, but is set out in (R, 39-43).

The sole question raised in this petition for certiorari is whether petitioner is entitled to a dividends paid credit in 1937 under the provisions of Section 27 (f) of the 1936 Revenue Act.

ASSIGNMENTS OF ERROR.

Petitioner assigns as error the following acts or omissions by the Board of Tax Appeals and by the United States Circuit Court of Appeals of the Seventh Circuit:

The Board and the Circuit Court having found that on November 30, 1937, petitioner, in pursuance of a plan of reorganization, transferred all of its assets, including its earnings, for the period from January 1, 1937, to November 30, 1937, to various Michigan, Ohio, and Nevada corporations, in exchange for the stock of the latter, which stock was then distributed by petitioner in complete liquidation to its stockholders in exchange for the stock of petitioner, such transactions being non-taxable under Section 112 (b), (4) and (3) of the Revenue Act of 1936,—

The Board erred in holding that because of Section 115 (h) of the 1936 Act, petitioner's distribution of stock did

not constitute a distribution of earnings or profits of any corporation, and that subsection (f), Section 27, must be construed in the light of Section 115 (h), and that since the distribution of stock by petitioner in liquidation wasn't a distribution of earnings under Section 115 (h), no part of the distribution of stock was properly chargeable to the earnings or profits, and that petitioner was therefore not entitled to any dividends paid credit under subsection (f) of Section 27.

The Court of Appeals for the Seventh Circuit erred in holding that the distribution in liquidation made by petitioner was not the distribution contemplated by Section 27 (f). That was undertaking the construction or interpretation of a provision of the law upon which your comment in *Commissioner vs. Credit Alliance Co.*, 316 U. S. 107, is as follows: "Whatever may be said of the policy behind the statute's provisions, we are not at liberty to disregard the direct and unambiguous language of subsection (f)",— And the Court below further erred in not passing upon the Commissioner's contention that Section 115 (h) limits the effect of Section 27 (f) and in not holding as it did hold in its *Winchester Repeating Arms* decision, (C. C. H., Federal Tax Service, 1943, Volume 4, page 9486), that it found in your decision in the *Credit Alliance* case no basis for the Commissioner's assumption that had the *Credit Alliance* case involved the application of Section 115 (h), as amended by the 1938 Act, your decision there would have been otherwise; and that it, the Seventh Circuit, did not feel at liberty to disregard the direct and unambiguous language of Section 27 (f).

The Board and the Seventh Circuit further erred in the finding of a deficiency for the year 1937, instead of determining that there was no additional undistributed profits tax due by petitioner for that year; and the Board and the Seventh Circuit further erred in not finding that petitioner is entitled to a redetermination of the alleged deficiency, and to a refund of the undistributed profits tax paid by petitioner in error at the time of filing its 1937 return.

ARGUMENT.

At this point we would like to direct the Court's attention to the fact that there has never been the slightest suggestion by anyone that petitioner in its liquidation and reorganization proceedings was in any way seeking to avoid a surtax on undistributed profits; and that it wasn't so seeking is most clearly shown by the fact that in making its income tax return for 1937, petitioner not only didn't even claim a dividends paid credit in the sum of its 1937 earnings, but actually sought to be allowed a dividends paid credit carry over for 1936, to which credit it believed itself at least equitably entitled. In so proceeding, petitioner actually paid an undistributed profits tax of \$6,923.40, when in truth it owed no undistributed profits tax whatever.

In the many cases involving the 1936 undistributed profits tax law, the Commissioner or Collectors of Internal Revenue put forward numerous defenses, and make

various contentions in attempted support of their claimed deficiencies. In what we believe to have been the first, or one of the first of these cases; namely, *Centennial Oil Co. vs. Thomas*, a Fifth Circuit decision, 109 Fed., (2d), 359, the Court sustained the Government's contention that 27 (h) denies the benefit of 27 (f) to the taxpayer if the money or property transferred is not taxable to the distributee. There is, however, in that case, a very strong dissenting opinion by Judge Hutcheson.

This same contention, however, has been overruled by the Circuit Court of Appeals of the Second Circuit in *Commissioner vs. Kay Mfg. Corp.*, 122 Fed. (2d), 443, and by the Board of Tax Appeals, and by the Fourth Circuit, and by this Court in *Helvering vs. Credit Alliance Corp.*, 42 B. T. A., 1020; 122 Fed. (2d), 361; and 316 U. S. 107.

Treasury Regulations 94, Article 27 (f), declaring that one making a liquidating distribution of earnings accumulated since February 28, 1913, must be denied the dividends credit in respect of such distribution, unless the amount distributed is taxable in the same year to the distributee, and providing that if the distributee in that year makes a distribution which entitles it to a dividends paid credit, it may allocate a proper proportion thereof to the distributor of the liquidating dividend, has been held by this Court in *Commissioner vs. Credit Alliance*, *supra*, to be not only contradictory of the plain terms of the subsection, but an attempt to add a supplementary legislative provision which could only be enacted by Congress, and that the Court below was right in refusing to give effect to the regulation.

The Court of Appeals of the Seventh Circuit, in *Commissioner vs. Winchester Repeating Arms Company*, *supra*, disagrees with the Commissioner in his deductions drawn from your decision in the *Credit Alliance* case, as to the control of 27 (f) by 115 (h);—but in order to stress the fact that it is not possible that Congress could have intended by Section 115 (h) to modify or control or destroy the effect of Section 27 (f), we are going to quote briefly from the decision of the Seventh Circuit in the *Winchester Repeating Arms* case as follows:

“The whole scheme for imposing a surtax on undistributed profits of corporations appeared first in the Act of 1936, Sections 26 and 27 of which provided for credits against the tax imposed by Section 14. Section 115, relating to distributions by corporations, is older, parts of it going back to 1916, and subsection (h) of which was new in the Act of 1934. This subsection was amended in 1936, but we are informed by the Committee Report No. 2457, Seventy-fourth Congress, that ‘While making no change in the rule as applied under existing law, the recommended amendment is desirable in the interest of greater clarity.’ In other words, the amendment in 1936 of a subsection enacted in 1934 was not intended to change the rule. Thus it will be seen that Section 115 (h), enacted in 1934 and amended in 1936, must have had a purpose entirely distinct from the subsequently enacted Section 27. We are not informed by the Committee Reports on the 1938 Revenue Act as to the reason for the amendment of Section 115 (h) to cover distribution of property or money in addition to that of stock or securities, as provided by Section 115 (h) of the 1936 Act. However, it does seem clear to us that if Congress intended to change the scope of Section 27 (f), it would have done so directly by amendment of

that Section instead of remotely by amendment of Section 115 (h)."

There seems to have been little left, therefore, for which the Commissioner might contend, and he is at last forced to pin his hopes to the argument that 27 (f) does not mean what it seems to mean; that when Congress speaks of amounts distributed in liquidation, it does so with a mental reservation as to the use of the word liquidation, and that it refers only to liquidations under the provisions of 112 (b) (6); i. e., the liquidation of a subsidiary corporation, and that the kind of liquidation petitioner went through is not the kind of liquidation that Congress had in mind.

May we here suggest that there is nothing whatever in the simple language of Section 27 (f) which would indicate that Congress had in mind any such restrictions in the meaning of the word "Liquidation"; and had Congress had any such intent, it would have been a very simple matter to have said so.

It is of course true that Congress, by amendment (b) (6) to Section 112, made distributions to parent corporations non-taxable in order to encourage the simplification of corporate structures, but the "No gain or loss" provision of Section 112 refers to no gain or loss for income tax purposes, and such exemption of gain or loss was ample encouragement to the liquidation of subsidiary corporations, and there is no reference whatever in Section 112 to the elimination of undistributed profits taxes.

It may be that Congress in enacting 27 (f) had partly in mind the furnishing of an additional incentive to the

simplification of capital structures, but we submit that even if this be so, Congress could not have intended to confine the benefits of Section 27 (f) to liquidations under 112 (b) (6).

If, however, the Commissioner in the instant case does not actually contend that the distribution in liquidation referred to in Section 27 (f) refers solely to the liquidation of subsidiaries under 112 (b) (6), then he must concede that a distribution in liquidation of any solvent corporation to its stockholders must, as to such part of the distribution properly chargeable to the earnings or profits accumulated after February 28, 1913, and for the purposes of computing the dividends paid credit, be treated as a taxable dividend paid, and the granting of such a benefit to any ordinary solvent corporation could not be in any way considered as encouraging the simplification of corporate structures, and we respectfully suggest that there is no more reason for so extending the benefits to the ordinary solvent corporation that goes into liquidation, than for extending such benefits to a corporation such as petitioner, whose liquidation occurred in connection with a reorganization.

The Commissioner, by way of brief in the Court below, naively says that; "In the *Credit Alliance* and *Kay Manufacturing* cases it was difficult to argue that a transfer of all the taxpayer's assets (including its earnings) to its stockholders, in liquidation of the taxpayer, was not a distribution of the taxpayer's earnings." And the Commissioner further says that, "The taxpayer was not perpetuated, but eliminated. The taxpayer's stockholders, as

recipients of the liquidating distribution, were the taxpayer's only successors. But here, as in the *Sansome* case, the taxpayer's assets (including its earnings) have been transferred to successor corporations, not to its stockholders"; and that, "The stockholders have not in any realistic sense received liquidating distributions at all."

Such being the Commissioner's theory, we would like to ask him, what possible difference is there in the end result of each of these two forms of liquidation, taxwise or otherwise. In the *Credit Alliance and Kay Manufacturing* cases, the owners of the stock of the parent company, by virtue of such ownership, owned the stock of the subsidiary company, and by virtue of such ownership owned the assets of the subsidiary company; and when the subsidiary company transferred all of its assets in liquidation to the parent company, the stockholders of the latter still owned all of the assets of the subsidiary.

We submit in the instant case petitioner's stockholders owned all of its assets prior to the liquidation, and continued to own all of its assets subsequent to the liquidation, and the end result as to the relationship of stockholders to assets is identical in both instances.

The Commissioner, of course, views with distaste the idea that petitioner is, by virtue of Section 27 (f), relieved of the necessity of paying undistributed profits taxes, but we submit there is no more reason for holding petitioner liable than there is for holding *Credit Alliance and Kay Manufacturing* liable; and certainly, and in any event, there was as much reason for Congress to extend the relief

from undistributed profits taxes to the liquidation of petitioner as there was to extend such relief to the liquidation of any ordinary corporation which transfers all of its assets to its individual stockholders.

Lastly, the Commissioner says that in the *Credit Alliance* and *Kay* cases, the liquidation was of a subsidiary corporation, which being tax free under 112 (b) (6), necessarily resulted in a simplification of the corporate structure, and the Congressional purpose was to encourage such simplification, while in the present instance there is a multiplication of corporations, and that with reference to 112 (b) (3), (b) (4), and (b) (5), reorganizations in general, there may be said to be no usually resulting corporate simplification.

And here, we would merely suggest that we all know the kind of corporate structure that Congress is supposed to have sought to have simplified, and such is not the corporate structure that resulted from petitioner's liquidation and reorganization. There can be no suggestion here that petitioner sought to accomplish any pernicious top-heavy organization.

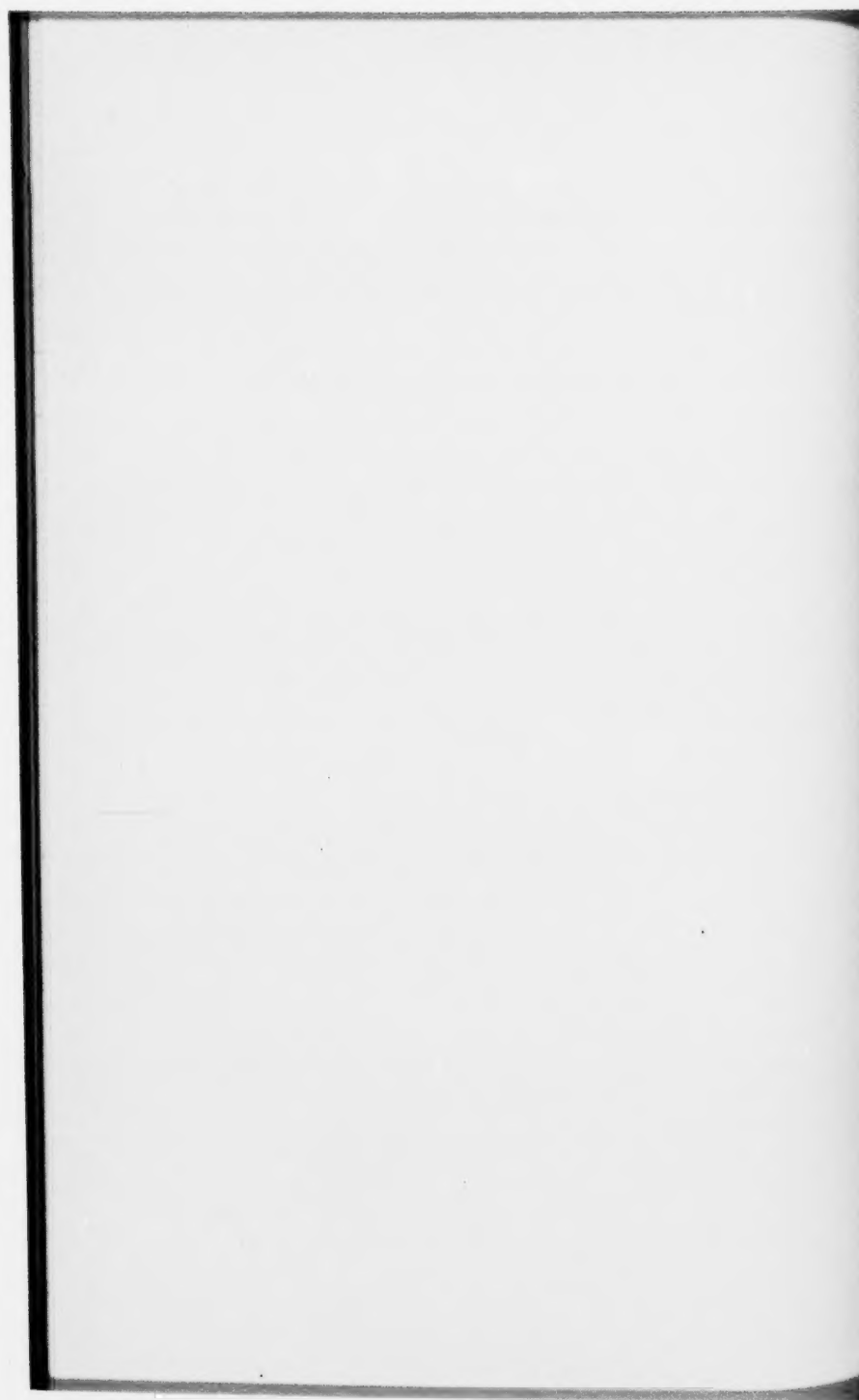
When all is said and done, there is but one issue in this case, and that is, whether petitioner, having distributed its assets in liquidation, is entitled under the direct and unambiguous language of 27 (f), to a dividends paid credit in the sum of its adjusted net income for the year 1937; and again we say that there is no difference in the end result between the *Kay Manufacturing Co.*, and the *Credit Alliance* cases, and the instant case.

And there seems to us no justification for seeking a construction and application of Section 27 (f) to petitioner, different from the construction and application of that Section in the *Credit Alliance* and *Kay Manufacturing* cases.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, that the Petition for Writ of Certiorari should be granted, and upon final hearing, the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	6

CITATIONS

Cases:

<i>Commissioner v. Credit Alliance Corp.</i> , 316 U. S. 107, affirm- ing 122 F. 2d 361	4
<i>Commissioner v. Kay Mfg. Corp.</i> , 122 F. 2d 443	5
<i>Commissioner v. Winchester Rep. Arms Co.</i> , 134 F. 2d 6	5
<i>Reed Drug Co. v. Commissioner</i> , 130 F. 2d 288	6

Statute:

Revenue Act of 1936, c. 690, 49 Stat. 1648, Section 27	2
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 952

GREAT LAKES COCA-COLA BOTTLING COMPANY,
PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 39-43) is reported at 133 F. 2d 953. The opinion of the United States Board of Tax Appeals (R. 17-20) is not officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 6, 1943 (R. 44). The pe-

tion for a writ of certiorari was filed on April 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer corporation transferred all of its assets to several new corporations in exchange for their capital stock, which it distributed to its own stockholders in exchange for its own stock, and thereupon dissolved. The question is whether, in computing its income subject to the undistributed profits tax imposed by Section 14 of the Revenue Act of 1936, the taxpayer is entitled to a dividends-paid credit under Section 27 (f) of that Act equal to the amount of its adjusted net income for that portion of the taxable year preceding the transfer of its assets to the new corporations.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 27. CORPORATION CREDIT FOR DIVIDENDS PAID.

(a) *Dividends Paid Credit in General.*—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year.

* * * * *

(f) *Distributions in Liquidation.*—In the case of amounts distributed in liquidation the part of such distribution which is properly chargeable to the earnings or

profits accumulated after February 28, 1913, shall, for the purposes of computing the dividends paid credit under this section, be treated as a taxable dividend paid.

* * * * *

STATEMENT

The facts in this case as found by the Board of Tax Appeals (R. 17-18) are not in dispute. The taxpayer was a Delaware corporation. On November 30, 1937, in pursuance of a plan of reorganization, the taxpayer transferred all of its assets, including its earnings for the period from January 1, 1937, to November 30, 1937, to various Michigan, Ohio, and Nevada corporations, in exchange for the stock of these new corporations. The taxpayer then distributed such stock in the new corporations to its stockholders in exchange for their stock of the taxpayer and the taxpayer was liquidated. These transactions were non-taxable exchanges under Section 112 (b) (3) and (4) of the Revenue Act of 1936 and no gain or loss was recognized thereon. (R. 17-18.)

As of January 1, 1937, the taxpayer had an operating deficit of \$36,988.92. For the purpose of the computation of the surtax imposed by Section 14 of the Revenue Act of 1936, the taxpayer's adjusted net income for the taxable year 1937 was \$195,262.14. (R. 18.)

In an amended petition filed with the Board of Tax Appeals, the taxpayer claimed a credit under Section 26 (c) (1) of the 1936 Act equal to

the amount of its operating deficiency of \$36,988.92 as of January 1, 1937, in computing the surtax imposed under Section 14 of the 1936 Act. It later abandoned this claim. (R. 18.)

In the proceeding before the Board and before the court below, the taxpayer claimed a dividends-paid credit under subsection (f) of Section 27 of the 1936 Act equal to the amounts of its adjusted net income for the period from January 1, 1937, to November 30, 1937 (R. 17, 18). Whether the taxpayer is entitled to this credit is the only question passed upon by the Board and the court below, and is the only question presented by the petition for a writ of certiorari. The Board of Tax Appeals disallowed this credit (R. 18-20) and its decision was affirmed by the Circuit Court of Appeals for the Seventh Circuit (R. 39-44). However, the Circuit Court of Appeals ordered the case remanded to the Board of Tax Appeals to determine whether the taxpayer is entitled to any dividends-paid credit under Section 26 (c) of the 1936 Act, as amended retroactively by Section 501 of the Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess. (R. 43).

ARGUMENT

The taxpayer's petition for a writ of certiorari is based primarily upon the allegation that the decision of the Circuit Court of Appeals in this case is in conflict with the decision of this Court in *Commissioner v. Credit Alliance Corp.*, 316 U. S. 107, affirming the decision of the Circuit Court

of Appeals for the Fourth Circuit, 122 F. 2d 361, and the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Kay Mfg. Corp.*, 122 F. 2d 443 (Pet. 8-10). The taxpayer further alleges that the decision below is in conflict with the decision of the same court rendered two days later in *Commissioner v. Winchester Rep. Arms Co.*, 134 F. 2d 6 (Pet. 9-10).

In all of these cases, however, the existing corporation was liquidated and its assets distributed to its stockholders. In each instance the dissolved corporation had an accumulated surplus which had been acquired subsequent to March 1, 1913, and which could have been distributed to stockholders as an ordinary dividend rather than as a part of the distribution in complete liquidation. The courts held that under those facts Section 27 (f) was applicable and that the liquidating corporation was entitled to a dividends-paid credit equal to the accumulated surplus which was distributed in liquidation.

The facts in the instant case are different, as the opinion below points out. This taxpayer transferred its assets, including its earnings for that part of the taxable year preceding the transfer, to several new corporations in exchange for their stock, which it then distributed to its shareholders. As pointed out by the court below (R. 41-42), the taxpayer corporation was dissolved but its business was continued by its successor corporations. The assets of the business, includ-

ing the earnings of the business for the period from January 1, 1937, to November 30, 1937, were held by the new corporations. The stockholders had simply exchanged their stock in the old corporation for the stock of the new. The accumulated earnings had not been distributed to the taxpayer's stockholders, but had merely been shifted to the new corporations in a tax-free exchange. In these circumstances the court below properly held, that this was not the distribution in liquidation contemplated by Section 27 (f) of the statute.

The only other case involving this same factual situation is *Reed Drug Co. v. Commissioner*, 130 F. 2d 288, in which the Circuit Court of Appeals for the Sixth Circuit reached the same result as did the court below.

CONCLUSION

The decision of the court below is correct and is not in conflict with any other decision. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MAY 1943.

